TXP OPERATING CO.

IBLA 85-554 Decided November 3, 1987
85-570

Appeal of two decisions of the Wyoming State Office, Bureau of Land Management, rejecting the noncompetitive oil and gas lease applications of TXP Operating Company for parcels 244 (C-41370), 277 (U-56807) and 304 (U-56834).

Affirmed as modified.

1. Oil and Gas Leases: Applications: Drawings

> Pursuant to the Notice published in the Federal Register on Aug. 19, 1983, 48 FR 37656, issued under the authority of 43 CFR 3102.5, a limited partnership is required to submit with a simultaneously filed application for an oil and gas lease the names of all of its general partners, and all other partners holding or controlling more than 10 percent of the partnership. It is not required to submit a list of limited partners where such partners own 10 percent or less of the partnership.

APPEARANCES: C. M. Peterson, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

TXP Operating Company (TXPO), the priority drawee for parcels Colorado 244 (C-41370), Utah 277 (U-56807), and Utah 304 (U-56834) in the February 1985 simultaneous oil and gas lease drawing, appeals from two decisions of the Wyoming State Office, Bureau of Land Management (BLM), rejecting appellant's lease applications. 1/ BLM rejected the lease applications because TXPO, a limited partnership, failed to name all other parties who held an interest in the application or lease as required by 43 CFR 3112.2-3. 2/ According to BLM, TXPO "did not indicate the names of the other members of the partnership in the 'FULL NAME OF OTHER PARTIES IN INTEREST (IF APPLICABLE)' block, and there was no separate listing provided with [TXPO's] application."

The applications at issue were signed "TXP OPERATING COMPANY, a limited partnership, By: Transco Exploration Company, its Managing General Partner." In its statement of reasons for appeal TXPO described its business structure:

1/ On Apr. 4, 1985, BLM issued nearly identical decisions rejecting the applications.
2/ The applicable regulation, 43 CFR 3112.2-3 establishes filing requirements for "associations including partnerships." We shall use the terms "associations" and "partnerships" interchangeably.

> In 1983, Transco Energy Company (hereinafter referred to as "Transco"), a Delaware corporation and a wholly owned subsidiary; Transco Exploration Company (hereinafter referred to as "TXC"), a Delaware corporation; together with Towtrans Company, a Texas corporation, as the Organizational Limited Partner, together with the persons who became limited partners formed Transco Exploration Partners, Ltd. (hereinafter referred to as "TXP"), a Texas limited partnership. All of the assets and substantially all of the liabilities of TXC were transferred to TXP. TXC received approximately 89% of TXP's initial limited partnership units in exchange for its contribution of its net assets with the remaining 11% sold to the public. Transco was designated as the Special General Partner. TXC was designated as the Managing General Partner.
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> Transco, as Special General Partner, TXC, as Managing General Partner and TXP, as the Initial Limited Partner formed TXP Operating Company (hereinafter referred to as "TXPO"), a Texas limited partnership, in which TXP holds a 99% limited partnership property interest, Transco a .05% general partnership interest and TXC a .95% general partnership interest. TXPO was formed as the operating entity for TXP. TXPO was formed primarily to avoid continuing filings of the names of the holders of publically [sic] traded limited partnership interests in every state in which the partnership does business. TXPO, as well as TXP, have no officers, directors, or employees. Officers and directors of TXC perform for TXP and TXPO all management functions and the employees of TXC conduct for TXP and TXPO the activities that would be conducted by employees of other business entities. Thus, the automated simultaneous oil and gas lease applications were signed by Wade S. McAlester, Vice President of TXC, the Managing General Partner.

TXPO contends that under Department regulations and policy, corporations are not required to list shareholders as parties in interest on the lease application, whereas partnerships are required to list partners as parties in interest. TXPO draws an analogy between itself and a corporation and asserts that since a corporation need not list its shareholders, it should not be required to list all partners.

In support of its contention, TXPO argues that numerous court decisions have recognized that limited partnerships have quasi-corporate characteristics. TXPO states that TXP, the limited partner in TXPO, is the largest publicly traded oil and gas limited partnership with 55,473,443 depository units held by 2,325 limited partners. Thus, TXPO contends that it is more like a corporation than a partnership. Like corporate stocks, TXP's depository units are personal property, freely alienable securities, registered with the Securities Exchange Commission (SEC) and traded on the New York Stock Exchange.

TXPO argues that, by requiring partnerships to list all partners, BLM is favoring the corporate business structure over partnership business structures. TXPO asserts there is no statutory basis for such favoritism under section 1 of the Mineral Leasing Act, 30 U.S.C. § 181 (1982), since both associations and corporations (as well as United States citizens) are authorized to hold oil and gas leases. Appellant argues that a regulation which requires one form of business entity to submit a list of 2,325 limited partners but excepts another form of business entity, viz., a corporation, from a similar disclosure requirement, is inherently arbitrary.

TXPO also cites Conway v. Watt, 717 F.2d 515 (10th Cir. 1983) for the proposition that nonsubstantive de minimis errors provide an inappropriate basis for rejecting oil and gas lease applications. TXPO also argues that, while the Notice published in the Federal Register on August 19, 1983, requiring all partners to be listed on the application appears to be a "per se" rule, by the terms of the notice BLM retained discretion to accept or reject an application. See 48 FR 37056 (Aug. 19, 1983). TXPO contends BLM should exercise that discretion in TXPO's favor. Finally, TXPO argues it is qualified to hold the lease, there is no evidence of fraud in the application, and rejection of the application would not promote exploration and development of oil and gas.

[1] Initially, we note that, technically, the basis for requiring disclosure of partners or members of an association is not that they are "parties in interest" as asserted by the State office. As we held in the Turner Association, 85 IBLA 374, 376 (1985), "There is no intimation [in the regulations] that * * * members [of an association] are considered to be `other parties in interest,' although the purpose of disclosure is the same, i.e., to determine whether a party in interest is qualified to hold a Federal oil and gas lease." The policy underlying disclosure was succinctly stated in one of the Department's earlier regulations:

> The requirement of disclosure in an offer to lease of an offeror's or other parties' interest in the lease, if issued, is predicated on the independent policy that all offerors and other parties having an interest in simultaneously filed offers to lease shall have an equal opportunity for success in the drawings to determine priorities. Additionally, such disclosures provide the means for maintaining adequate records of acreage holdings of all such parties where such interests constitute chargeable acreage holdings.

29 FR 4511 (Mar. 31, 1964).

Originally, all members of an association were required to make the same showings required of an individual applicant as to qualifications when making an oil and gas lease offer. See, e.g., 43 CFR 3123.2(f) (1964). In 1968, this was amended to provide that, in most cases, associations need only identify members owning or controlling more than 10 percent of the association. See 43 CFR 3123.2(f)(1) (1969). In 1979, the Department proposed to amend that regulation to require a "complete list of all partners or members together with a statement as to their citizenship." 44 FR 56178

(Sept. 28, 1979). However, in response to numerous objections, the Department modified this language to require the naming of only general partners. The preamble to the final regulation explained the reasons why this approach was adopted:

> A few of the comments on section 3102.2-4 of the proposed rulemaking suggested that it was excessively burdensome to require that a complete list of the partners of a partnership, particularly a limited partnership, be furnished. In response to these comments, the final rulemaking has been amended to require a list of all general partners. This amendment eases the burden imposed on limited partnerships and provides the Bureau of Land Management with information it needs to identify prohibited filings. The amendment is consistent with the requirement that corporations submit a list of corporate officers. (Emphasis supplied.)

45 FR 35157 (May 23, 1980). Hence, the Department promulgated 43 CFR 3102.2-4(a)(3) (1980), which required a "complete list of all general partners or members together with a statement as to their citizenship" and "a statement from each person owning or controlling more than 10 percent of the association * * *." (Emphasis supplied.) See Pirindel Investment Research, 65 IBLA 111 (1982).

The regulation requiring associations to file a complete list of all general partners was in effect from June 16, 1980, to February 26, 1982. See 45 FR 35156 (May 23, 1980), and 47 FR 8544 (February 26, 1982). The provision was deleted when the Department amended the regulations to change from a qualifications system to a simple certification of compliance system.

Thus, prior to 1982, the Department generally required all lease applicants to submit with a lease offer a detailed qualifications statement or to make reference to a qualifications statement previously filed with the Department. The maintenance of qualifications files was ultimately deemed inefficient and cumbersome by BLM officials and was replaced with a certification system in an Interim Final Rulemaking, 47 FR 8545 (Feb. 26, 1982). Under the certification system, applicants, by signing their lease applications, are deemed to certify that they have fulfilled all the qualifications requirements. The provision which required the submission of "a complete list of all general partners," 43 CFR 3102.2-4(a)(3) (1981), was deleted at that time. The relevant provision in Subpart 3102 as amended to read:

> Submission of a lease application, offer or request for approval of an assignment constitutes certification of compliance with the regulations of this group and the Act. Compliance means that the potential lessee, all other parties who hold an interest (as defined in § 3000.0-5(a) of this title) in the application, offer, assignment or lease or all parties who hold or control more than 10 percent interest in a lessee which is a corporation or association are: (a) Citizens of the United States or qualified stockholders in a domestic corporation (see § 3102.2 of this

> title); (b) in compliance with the Federal acreage limitations (see §§ 3101.1-5 and 3101.2-4 of this title); (c) not minors (see § 3102.3 of this title); and (d) not participants in any agreement, scheme, plan or arrangement prohibited in relation to simultaneous oil and gas leasing (see § 3112.6-1(a) of this title). Anyone seeking to acquire, or anyone holding, a Federal oil or gas lease or interest therein, may be required to submit additional information to show compliance with the regulations of this group and the Act.

See 43 CFR 3102.5 (1982). It is to be noted that, under this regulation, the automatic certification only related to "all parties who hold or control more than 10 percent interest in a lessee which is a[n] * * * association." Thus, this regulation essentially abandoned the general/limited partner dichotomy and limited the scope of Departmental interest to partners owning more than 10 percent of the partnership.

On June 30, 1982, the Department promulgated a proposed general revision of the oil and gas leasing regulations. No changes were proposed in 43 CFR 3102.5. See 47 FR 28559. However, when this regulation was adopted as final rulemaking in 1983, an additional phrase, of uncertain moment, was added. Thus, as promulgated, 43 CFR 3102.5 reads, in pertinent part:

> Compliance means that the potential lessee, all others parties who hold an interest (as defined in § 3100-5(k) of the title [3/] and all persons who are members of an association in the application, offer, assignment or lease and all parties who hold or control more than 10 percent of the instruments of ownership or control in a lessee which is a corporation or association are [qualified to hold the lease]." (Emphasis supplied).

48 FR 33667 (July 22, 1983).

The purpose behind the addition of the underlined language is by no means clarified by recourse to the preamble of the final rulemaking, as not a single reference is made to this addition. The explanatory notes provide as follows:

> The comments on this section of the proposed rulemaking were directed primarily to the issue of not requiring substantive evidence of qualification prior to lease issuance on the basis that this will invite fraud. Two comments raised the point that there was no provision for the filing of a power-of-attorney. The changes in the requirements for filing of qualifications documents at the time an offer is filed were adopted by interim final rulemaking on February 26, 1982 (47 FR 8544), and the paperwork reduction and development of an audit procedure were fully discussed. This final rulemaking continues the

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This was amended to read "§ 3000.0-5(k)" on Aug. 30, 1983. See 48 FR 39225.

> effort to reduce the regulatory burden imposed on the public, while imposing a spot check audit system that will assure compliance with the requirements of the law that were put forward in the interim final rulemaking.

48 FR 33652. While the preamble is silent as to the intent or ambit of the language added, it would be totally inconsistent with the thrust of regulatory actions from 1968 through 1983 to assume that BLM intended to require limited partners (except where such partners held or controlled more than 10 percent of the partnership) to certify compliance. Certainly nothing in the published explanation gives credence to such an intent, and it would be hard to reconcile such a requirement with the stated purpose of decreasing the regulatory burden.

Our final inquiry concerns a BLM Rule Related Notice regarding disclosure of members of associations including partnerships. See 48 FR 37656 (Aug. 19, 1983). The Notice provides in part:

> After August 22, 1983, applications for simultaneously offered parcels from associations, including partnerships, must be accompanied by a complete list of individuals who are members thereof. This requirement is authorized under 43 CFR 3102.5. By this notice, the Bureau of Land Management formally interprets and exercises its right of demand for this information at the time application is made. Failure by associations or partnerships to comply with this requirement shall result at the discretion of the authorized officer in unacceptability or rejection of the application. Formal statements of qualifications, providing other information that BLM may demand under that subsection, should not be filed with the Bureau unless a specific request for such is made by the Bureau. [Emphasis supplied.]

By its terms, this Notice requires the disclosure of "a complete list of individuals who are members." However, we expressly noted in The Turner Association, supra, at 376 n.4 (1985) that this Notice essentially was "merely a resurrection of the previous regulatory requirement" found at 43 CFR 3102.2-4(a) (1981). As we discussed above, this regulation was expressly limited in scope to general partners.

Admittedly, neither The Turner Association, supra, nor an earlier interpretation of this Notice, Shaw Resources, Inc., 79 IBLA 153, 91 I.D. 122 (1984), examined whether or not this disclosure requirement applied to all partners or only to general partners. However, nothing in those decisions precludes an interpretation limiting the scope of the disclosure requirement to general partners. In any event, the scope of the Notice directing that partnerships file lists of their members could be no larger than the regulation, 43 CFR 3102.5, on which it was based. To the extent, therefore, that we have concluded that the certification applied only to general partners and any other partner holding or controlling more than 10 percent of the partnership, it must follow that the requirement to list such partners is applicable only to such entities. Accordingly, for the reasons set forth above, we find it entirely consistent with the thrust of recent regulatory changes to hold

that an association or partnership need only disclose all general partners and any other partner holding or controlling more than 10 percent of the entity at the time of filing its application. 4/

TXPO, which argues it would be unfair to require it to submit a list of several thousand limited partners, with each application, assumes BLM rejected its lease offer for its failure to list all partners, limited partners as well as general partners. Whether that was BLM's intent is unclear from its decision. BLM did not distinguish limited partners from general partners. Nevertheless, based on the analysis set forth above, we conclude that a partnership is required by 43 CFR 3102.5 to submit with an oil and gas lease application a complete list of general partners but is not required to submit a list of limited partners, except for those limited partners holding or controlling more than 10 percent of the partnership.

However, even when the disclosure requirement is limited to general partners, it is clear that appellant's application was properly rejected. Thus, it admits on appeal that both Transco and TXC were general partners. While Transco was identified on the application as the "Managing General Partner," TXC was not identified at all. Since TXC was a general partner, the failure to list it constituted a violation of the disclosure requirement and required rejection of the application. 5/

This brings us back to appellant's argument that rejection for this omission would represent a violation of the rationale implicit in Conway v. Watt, supra, that minor technicalities should not be used as a basis for rejection of an oil and gas lease application. We do not agree.

As we noted above, disclosure of general partners in an association is an integral part of the Department's policing of the simultaneous system to

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4/ We are aware that BLM has proposed substantial revisions to the oil and gas leasing regulations. See 52 FR 22592 (June 12, 1987). Our review of these proposed rules discloses nothing which undermines the analysis contained in this decision. See Proposed Rule 43 CFR 3102.5-2, 52 FR 22605.

5/ Appellant argues that, by the terms of the Notice, BLM had authority to exercise its discretion in deciding whether or not to reject the application. In Shaw Resources, Inc., supra, we examined similar language of 43 CFR 3112.3 purporting to grant the authorized officer unfettered discretion to determine whether an application was unacceptable or should be rejected. As noted therein, despite the attempts of the regulation to grant the authorized officer authority to either declare an application "unacceptable" (which would result in the loss of only $ 75 per application form) or "rejected" (which entails the loss of all filing fees tendered with the form), the actual authority of the authorized officer was circumscribed by other provisions of the regulations. As discussed in Shaw Resources, Inc., supra at 176-77, 91 I.D. at 135), the instant infirmity requires rejection rather than a finding of unacceptability. Under no interpretation, however, did BLM have the right to waive a violation of the disclosure requirement. See Kerogen Crusher, 95 IBLA 63, 65 n.3 (1986).

prevent abuses. As such, failure to comply with the disclosure requirement is not a "de minimis" violation. See KVK Partnership v. Hodel, 759 F.2d 814 (10th Cir. 1985); Satellite 8211104, 89 IBLA 388, 397 (1985), aff'd, Satellite 8301123 v. Hodel, 648 F. Supp. 410 (D. D.C. 1986).

Appellant, however, argues that the present Departmental scheme is fundamentally irrational in that it requires disclosure of partners (even if limited to general partners) who may have minimal ownership interests in an application, while at the same time the Department has amended the regulations in such a way that not only are majority owners of corporations not subject to disclosure but they may cause numerous corporations over which they exercise control to file on the same parcel and not even violate the multiple-filing prohibition.

Appellant bases its argument on the 1983 and 1984 revisions of the definition of "interest." As amended, the applicable regulation, 43 CFR 3000.0-5(l), presently provides:

> "Interest" means an interest in a lease, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights, options or any agreement covering such interests. Any claim or any prospective future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues or profits which may be derived, or which may accrue, in any manner from the lease based upon, or pursuant to any agreement or understanding existing at the time when the application or offer is filed, constitutes an interest in such lease. "Interest" does not include stock ownership, stockholding or stock control in a lease offer or in a bid, except for purposes of § 3101.2 and Subpart 3102 of this title. (Emphasis supplied).

The rationale behind this amendment is not easily discerned. First of all, this definition was not part of the originally proposed amendment in 1982. See 47 FR 28550 (June 30, 1982). In promulgating the final rulemaking on July 22, 1983, the only explanation for the provision was "[a]nother example of a change adopted by the final rulemaking for clarity was the shortening of the definition of the term party in interest and the addition of the term interest." 48 FR 33648. Once again, therefore, it is impossible to flesh out the meaning and purpose of this language by resorting to the expressed regulatory intent, since none was expressed.

In any event, however, we think appellant misperceives the effect of this regulation. It does not, as appellant contends, permit an individual who owns 100 percent of two different corporations to file both on the same parcel without running afoul of the multiple filing prohibition. Indeed, it is open to question whether a regulation purporting to do so would be of any force or effect in view of the Department's affirmative obligation to protect the simultaneous system from abusive practices. See McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); June Oil & Gas, Inc., 41 IBLA 394, 86 I.D. 374 (1979) aff'd 717 F.2d 1323 (10th Cir. 1983), cert. denied, 466 U.S. 958 (1984); Schermerhorn Oil Corp., 72 I.D. 486 (1965). In reality, however, a close reading of the regulation shows that this is not the case.

While the regulation does exclude the ownership, holding, and control of stock from the definition of "interest," this exclusion is expressly made non-applicable for purposes of 43 CFR 3101.2 (acreage limitations) and 43 CFR 3102.5. Under 43 CFR 3102.5, an application on behalf of a corporation expressly certifies that each person owning or controlling more than 10 percent of the stock therein has not violated certain regulations, including, inter alia, the prohibition against multiple filings. Therefore, it would be impossible for a corporation to certify compliance if more than 10 percent of its stock was owned or controlled by an individual who either filed in his own right or had a 10 percent interest in another corporation which had also filed on the parcel.

It is true, as appellant argues, that the effect of the Notice published on August 19, 1983, is to require the submission of a list of general partners and owners of 10 percent or more interest in the partnership when the partnership makes an application, while corporations making similar filings need submit such information only if specifically so directed after the filing. But the Department's experience with the simultaneous system has shown that, over the years, differing aspects of the leasing program have generated abuses. Thus, the Department must have some flexibility in tailoring its program so it may confront new problems as they arise. Clearly, the Department has determined that abuses relating to partnership and association filings require a more active role on its part in policing the system. From our perspective, we cannot say it is wrong. See, e.g., Satellite 8301123 v. Hodel, supra; KVK Partnership v. Hodel, supra.

To the extent that this may apparently result in disparate procedural treatment of corporations vis-a-vis partnerships, it is sufficient to note that the choice of whether to incorporate or form a partnership is, itself, generally determined by the disparate treatment accorded these entities under numerous provisions of the law. Appellant chose the partnership form apparently because it concluded that, overall, this was the most beneficial form in which to conduct its business. Having freely elected this structure, it should not be heard to complain that, in some circumstances, a corporation may be more favorably treated. 6/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified.

James L. Burski
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

6/ Moreover, there is no guarantee that, at some future date, the Department, in response to an increase in abuses centered in corporate filings, might not see fit to more rigorously

examine corporate qualifications.